

# STEP-BY-STEP GUIDE FOR DETERMINING IF COMMERCIAL OR FINANCIAL INFORMATION OBTAINED FROM A PERSON IS CONFIDENTIAL UNDER EXEMPTION 4 OF THE FOIA

## Step-by-Step Guide for Determining if Commercial or Financial Information Obtained from a Person is Confidential Under Exemption 4 of the FOIA

In the wake of the Supreme Court's decision in *Argus Leader*, the term "confidential" under Exemption 4 must be given its "ordinary" meaning. This step-by-step guide can be used by agencies, in conjunction with OIP's guidance, to determine whether commercial or financial information provided by a person is "confidential" under Exemption 4.

**1. Does the submitter customarily keep the information private or closely-held? (This inquiry may in appropriate contexts be determined from industry practices concerning the information.)**

- If no, the information is *not* confidential under Exemption 4.
- If yes, answer question 2.

**2. Did the government provide an express or implied assurance of confidentiality when the information was shared with the government?**

- If no, answer question 3.
- If yes, the information is confidential under Exemption 4 (this is the situation that was present in *Argus Leader*).

**3. Were there express or implied indications at the time the information was submitted that the government would publicly disclose the information?**

- If no, the information is "confidential" under Exemption 4 (the government has effectively been silent – it hasn't indicated the information would be protected or disclosed – so a submitter's practice of keeping the information private will be sufficient to warrant confidential status).
- If yes, and no other sufficient countervailing factors exist, the submitter could not reasonably expect confidentiality upon submission and so the information is *not* confidential under Exemption 4.

Agencies should feel free to contact OIP if they have any questions or for assistance in applying this analysis.

*Updated October 7, 2019*